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IN THE

Supreme Court of the United States

October Term, 1978

CHARLES BERG,

Petitioner,

vs.

JOAN ANDERSON GROWE, Secretary of State, State of Minnesota, et al.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the challenged Minnesota statute which determines the order in which a candidate's name appears on the ballot, the names of candidates nominated by petition follow the names of candidates nominated at primaries. Where the Minnesota Supreme Court has determined that the trial record affords no adequate means for measuring the extent of any positional bias, does the statute deny equal protection of the laws to a candidate for the Minnesota Senate nominated by petition?

STATUTE INVOLVED

Minn. Stat. § 203A.33, subd. 2 (1976):

> *Ballots, candidates nominated by petition.* At the general election, and in the case of partisan offices only, the names of candidates nominated by petition shall follow those of candidates nominated at primaries in the order in which the petitions are filed.

STATEMENT OF THE CASE

Charles Berg was a 1976 candidate for the Minnesota Senate nominated by petition.[1] In 1975, he commenced this challenge

[1] Berg was not affiliated with a political party. "Political parties" in Minnesota are defined by statute. To meet that definition, a party must maintain an organization whose members number at least five percent of the total number of votes cast in the last general election in the county where application is made or have had a candidate in the last general election who received at least five percent of the vote. Minn. Stat. § 200.02, subd. 7 (1976). Presently, the Democratic-Farmer-Labor Party, the Independent-Republican Party, and the American Party are the only political parties in Minnesota.

to the constitutionality of Minn. Stat. § 203A.33, subd. 2 (1976) in Ramsey County District Court.

Berg contended at trial that a candidate whose name appears first on a ballot has an advantage over those candidates whose names follow. Under the challenged statute, Berg's name[2] would follow[3] the names of the candidates nominated at party primaries.[4] He claimed that this statutory ballot ordering denied him equal protection of the laws under the Fourteenth Amendment of the United States Constitution.[5]

The district court upheld the constitutionality of the statute and the Minnesota Supreme Court, sitting *en banc*, unanimously affirmed. Characterizing the expert testimony offered at trial as ". . . somewhat imprecise and inconclusive,"[6] the Court nevertheless found a consensus on five points:

> (1) Positional bias exists in most elections, but with a variable impact.
>
> (2) Candidates' party affiliation is the single most important factor influencing a voter.

[2] Candidates nominated by petition are so designated on the ballot as is the political principle which each candidate represents. Minn. Stat. §§ 202A.29, subd. 1 and 203A.34 (1976). Candidates affiliated with a political party are designated by the party label.

[3] On voting machines, "follow" may mean vertically underneath the top name or horizontally to the right of the first name, whichever applies. *See* Minn. Stat. § 203A.33, subd. 4 (1976).

[4] In the original action in the trial court, plaintiffs other than Berg challenged Minn. Stat. § 203A.33, subd. 4 (Supp. 1975). That statute placed the names of the candidates of the political party that had received the largest number of votes in the last preceding general election in the first ballot position. At the conclusion of testimony, but prior to the District Court's decision, the Minnesota legislature amended the challenged provision by substituting the word "smallest" for the word "largest." Minn. Stat. § 203A.33, subd. 4 (1976). Consequently, those plaintiffs dismissed their challenge.

[5] No First Amendment claim was addressed by the trial court nor raised, briefed, or decided on appeal to the Minnesota Supreme Court.

[6] Petition for Writ of Certiorari to the Supreme Court of the State of Minnesota, Appendix A, at A-5 (hereinafter "Appendix").

(3) Because of the importance of party affiliation, the effect of positional bias is considerably more pronounced in nonpartisan elections.

(4) The magnitude of positional bias tends to vary in inverse proportion to the visibility of a particular election. The less important (for whatever reason) the election, the greater the effect of positional bias.

(5) Numerous factors other than ballot position, including sex, ethnic background, and age, can influence an uninformed voter.[7]

The Court then analyzed the interplay of those points, further distilling them into the threefold conclusion that ". . . party designation is of far greater importance than ballot position"; that the effect of positional bias is ". . . much less pronounced in partisan elections"; and that, although positional bias may exist, the trial record offered ". . . no adequate means for measuring its extent."[8]

Based upon its findings as to the nature of positional bias, the Minnesota Supreme Court determined that the challenged statute did not constitute a sufficiently direct infringement on fundamental franchise rights to require the application of the strict scrutiny standard under the equal protection clause. In doing so, it adopted the reasoning in *Clough v. Guzzi*, 416 F. Supp. 1057 (D. Mass. 1976) (three-judge court).[9] The federal court there observed that ballot ordering statutes

> ". . . do not impose direct restrictions on the right to vote, *e.g., Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed.2d 169 (1966) (poll tax); they do not effectively bar candidates from an election by imposing prohibitively burdensome candidacy filing fees . . . and they do not restrict the ballot to candidates of only certain political parties . . . ."[10]

[7] *Id.*, at A-5, 6.
[8] *Id.*, at A-8, 9.
[9] *Id.*, at A-10, 12.

Applying the rational basis standard, the Minnesota Supreme Court held the statute constitutional:

> The fact that party designation, not ballot position, is the most substantial influencing factor supports the legislative determination expressed by § 203A.33, subd. 2 and 4. The expert testimony at trial reveals that over 2/3 of the voters in Minnesota identify with a major political party. The method selected by the legislature to assist partisan voters in locating their candidates on the ballot cannot be overturned by this court merely because we think a rotation system would be marginally more fair.[11]

REASONS FOR DENYING THE WRIT

The Ruling of the Court Below is Not in Conflict With the Decisions of This Court or Other Courts.

Petitioner contends that there is a direct conflict between the decision of the Minnesota Supreme Court in the instant case and the decision of *Sangmeister v. Woodward*, 565 F.2d 460 (7th Cir. 1977) *appeal dismissed sub nom, Illinois State Board of Elections v. Sangmeister*, No. 77-1100, 46 U.S.L.W. 3597 (U.S., March 27, 1978). This contention is erroneous because the issues and the sufficiency of the evidence in each case were significantly different.

[10] *Id.*, at A-11.
[11] *Id.*, at A-13.

Sangmeister was a consolidated appeal from two district court decisions. In each of the district court actions, the plaintiffs had challenged the practice by election officials of placing the name of the candidate of their own respective political parties in the first ballot position. Both district courts found the challenged practice unconstitutional and ordered remedial action. The remedy directed by one district court, *Culliton v. DuPage County Board of Election Commissioners*, 419 F. Supp. 126 (N.D. Ill. 1976), required that the ballot order for each of the candidates and for each of the competing parties seeking straight ticket votes be determined by a drawing in the impending election and rotated in subsequent elections. 419 F. Supp. at 129. The remedy in the other action was expressly limited to rotation of major parties. The minor party represented at the trial did not appeal that limitation. *Sangmeister v. Woodward, supra* at 464 & n. 5.

Although the district court in *Culliton* included all candidates in its order, the propriety of that inclusion was not addressed by the Court of Appeals because the appellate court chose, because of procedural questions, to remand the action for further proceedings on the merits. Therefore, the only issue before the Court of Appeals was the issue raised by the second consolidated action which expressly excluded minor parties and independent candidates from its remedy.[12]

Unlike *Sangmeister*, the instant decision of the Minnesota Supreme Court addressed ballot rotation only as it involved

[12] Although the Court of Appeals ordered that its remedial rotational selection procedure ". . . should take account of all political parties involved, major and/or minor" its order in that respect was dictum. Sangmeister v. Woodward, 565 F.2d 460, 468 (7th Cir. 1977) *appeal dismissed sub nom*, Illinois State Board of Elections v. Sangmeister, No. 77-1100, 46 U.S.L.W. 3597 (U.S., March 27, 1978).

a candidate unaffiliated with a political party. In addition, the effect of ballot placement on voting is a question of fact. *Sangmeister v. Woodward, supra* at 465. Although the Court of Appeals found that the plaintiffs in each of the district court actions under review had met their burden of demonstrating that first position on the ballot confers an advantage to a candidate, the Minnesota Supreme Court found that ". . . the testimony below, while permitting a finding that positional bias does exist, furnishes no adequate means for measuring its extent."[13] Therefore, not only did *Sangmeister* not decide the issue presented to the Minnesota Supreme Court, but the sufficiency of the evidence in each case was at variance as well. Thus, the two decisions are not conflicting.

Finally, the Minnesota Supreme Court's decision is consistent with the decisions of this Court and other courts. Contrary to petitioner's suggestion, positional bias does not confer a permanent monopoly on the two major political parties because it is not immutable. Its effect ". . . depends upon the existence of a pool of presumably uninformed voters." *Clough v. Guzzi*, 416 F. Supp. 1057, 1067 (D. Mass. 1976). Consequently, anyone having

> . . . access to those voters . . . may, in theory and possibly in practice, so educate them as to eliminate the donkey vote and thus eliminate the statistical position bias.

Id.

[13] Appendix, at A-8.